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No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

G. WILLIAM MILLER, SECRETARY OF THE TREASURY, ET AL., PETITIONER

v.

CASTLEWOOD INTERNATIONAL CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 596 F.2d 638. The opinion of the Florida Supreme Court (App. B, *infra*, 12a-19a)

is reported at 367 So.2d 613. The opinion of the district court (App. C, *infra*, 20a-29a) is reported at 404 F. Supp. 88.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 30a-31a) was entered on June 6, 1979. A timely petition for rehearing was denied on August 29, 1979 (App. E, *infra* 32-33a). On November 19, 1979, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including December 27, 1979, and on December 19, he extended it to and including January 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Treasury Department ruling, providing that discounts given by a supplier of alcoholic beverages to a retailer that result in a wholesale price below the supplier's "laid-in" cost are presumptively in violation of the prohibition in Section 5(b)(3) of the Federal Alcohol Administration Act against a supplier's giving gifts or inducements to retailers, is in conflict with a Florida statute that does not prohibit discounts below "laid-in" cost.

2. If the Treasury ruling is in conflict with the Florida statute, whether the ruling is invalid under the Twenty-First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section Two of the Twenty-First Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 5 of the Federal Alcohol Administration Act, 27 U.S.C. 205, provides in pertinent part:

> § 205. Unfair competition and unlawful practices
>
> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:
>
> * * * * *
>
> (b) "Tied house"
>
> To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or

prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; * * *

Sections 561.01 and 561.42 of the Florida Statutes Annotated (West Supp. 1979) provide in pertinent part:

561.01 Definitions

As used in the Beverage Law:

* * * * *

(10) "Discount in the usual course of business" means a cash or spirituous or vinous beverage merchandise discount given pursuant to an agreement made at the time of sale. However, such agreement shall not result in an accrued, accumulated, or retroactive discount. The same discounts shall be offered to all vendors buying similar quantities. Any discount which is in violation of this section shall be considered an arrangement for financial assistance by gift.

* * * * *

561.42 Tied house evil; financial aid and assistance to vendor by manufacturer or distributor prohibited; procedure for enforcement; exception

(1) No licensed manufacturer, or distributor, of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the beverage law, nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed manufacturer or distributor; provided, however, that this shall not apply to any bottles, barrels or other containers necessary for the legitimate transportation of such beverages, or advertising materials, and

shall not apply to the extension of credit, for liquors sold, made strictly in compliance with the provisions of this section.

* * * * *

(6) Nothing herein shall be taken to forbid the giving of trade discounts in the usual course of business upon wine and liquor sales.

* * * * *

ATF Ruling 76-16, 1976 ATF Cum. Bull. 78, is reprinted as App. F, *infra*, 34a-37a.

STATEMENT

1. Both the United States and the State of Florida regulate the intoxicating liquor trade through licensing of manufacturers and wholesalers. 27 U.S.C. 203(a); Fla. Stat. Ann. §§ 561.14-561.19 (West Supp. 1979).[1] Both federal and Florida law also prevent manufacturers and wholesalers from exercising control over retailers, a pre-Prohibition practice known as the "tied house evil." The Federal Alcohol Administration Act, passed soon after ratification of the Twenty-First Amendment (Aug. 29, 1935, ch. 814, 49 Stat. 977), prohibits manufacturers and wholesalers from "giving * * * [any] supplies, money, services, or other thing of value" to retailers to induce the purchase of their products to the exclusion in whole or in part of products "sold or offered for sale by other persons in interstate or foreign commerce."

[1] Like most other states, Florida also licenses retail establishments, Fla. Stat. Ann. § 561.14(3) (West Supp. 1979), but the federal government does not.

27 U.S.C. 205(b)(3). This prohibition, like those in the Act against commercial bribery and deliveries on consignment (27 U.S.C. 205(c) and (d)), was designed to prevent restraint or monopolization of interstate or foreign commerce in alcoholic beverages. H.R. Rep. No. 1542, 74th Cong., 1st Sess. 11 (1935). The practices involved were thought to be analogous to those prohibited under the antitrust laws. *Id.* at 12. The "tied house evil" provision was also expected to mitigate certain "social evils" associated with those practices, notably the increased sale of alcoholic beverages from the tied house and other retail outlets seeking to compete with it. *Ibid.*; see also S. Rep. No. 1215, 74th Cong., 1st Sess. 5-6 (1935).[2]

Florida adopted a counterpart of the federal "tied house evil" provision in 1935. Florida law prohibits manufacturers and wholesalers from giving retailers "any gifts or loans of money or property of any description or * * * the giving of any rebates of any kind whatsoever." Fla. Stat. Ann. § 561.42(1) (West Supp. 1979).

Neither the Federal Act nor Florida law directly regulates the prices at which licensees sell their liquor, thereby permitting free market forces to determine price. However, because of the ease with which gifts and other inducements tying a retailer to a wholesaler or manufacturer may be disguised as a discount in

[2] Some of the practices governed by 27 U.S.C. 205—especially commercial bribery—may also have been prohibited on their own merits because of a congressional concern about the involvement of organized crime in the liquor industry, even after the repeal of Prohibition. H.R. Rep. No. 1542, *supra*, at 3; S. Rep. No. 1215, *supra*, at 2.

an ostensibly bona fide sale, both statutory schemes attempt to distinguish between the bona fide sales discount and the illicit gift.

In a Revenue Ruling issued in 1954, the Secretary sought to furnish some guidance to the industry as to when a violation of 27 U.S.C. 205(b)(3) might occur. Rev. Ruling 54-161, 1954 Cum. Bull. 338. This ruling provides that price reductions, rebates, refunds, discounts, and free goods given by a wholesale liquor dealer to a retail liquor dealer pursuant to an agreement made at the time of sale will ordinarily be considered part of the sales transaction and not in violation of 27 U.S.C. 205(b)(3). The ruling does provide, however, that if the amount of free goods (and presumably other forms of discounts as well) is such that the pricing aspect is merely a subterfuge, the transaction would constitute a "gift" in violation of the Act.

In 1974, the Bureau of Alcohol, Tobacco, and Firearms (ATF) issued a ruling intended to elaborate upon Revenue Ruling 54-161. In its Ruling 74-6, 1974 ATF Cum. Bull. 50, ATF stated that in determining whether a discount is in fact a method for arriving at an agreed-upon price, rather than a subterfuge for a prohibited inducement to a retailer to exclude another supplier's products, ATF would look to whether there is a "reasonable relationship" between the discount and the purpose for which it is given—"e.g., a discount given in connection with a volume purchase must bear a reasonable relationship to the savings in cost accruing to the

supplier in the manufacture, sale, or delivery of the product."

This interpretation was further amplified in ATF Ruling 76-16, 1976 ATF Cum. Bull. 78 (App. F, *infra*, 34a-37a), which provides that any discount resulting in a price to the retailer below the supplier's "laid-in cost" would be considered questionable and subject to investigation.[3] Ruling 76-16 expressly states that a sale below laid-in cost will not automatically be regarded as a violation of 27 U.S.C. 205(b)(3), but that ATF would regard such a sale as a subterfuge for a proscribed gift or other inducement if a bona fide business reason (such as the introduction of a new product line or closing out of an old product line) is not advanced to justify the discount.

Florida law likewise exempts discounts given "in the usual course of business" from the general prohibition against gifts or loans to retailers. Fla. Stat. Ann. § 561.42(6) (West Supp. 1979). Prior to 1963, the term "discount in the usual course of business" was defined to mean "a cash discount given simultaneously at the time of sale, which shall not exceed the allowable discount fixed by the director [of

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[3] Laid-in cost is defined to mean "that cost incurred by a wholesaler or supplier to place the goods in inventory and would consist of such costs as manufacturer's invoice price, freight, and state and local taxes" (App. F, *infra*, 36a). ATF Ruling 75-12, 1975 ATF Cum. Bull. 33, superseded by ATF Ruling 76-16, would have added the supplier's operating costs to the laid-in cost in determining the level below which wholesale prices could not go without triggering the presumption that the discount was a prohibited inducement.

the state beverage department]." Fla. Stat. Ann. § 561.01(13) (West 1962). The provision for the director to set a maximum discount was replaced in 1963 with a requirement that a discount be given in cash pursuant to an agreement made at the time of sale and be offered to all retailers buying similar quantities. Fla. Stat. Ann. § 561.01(10) (West Supp. 1979); see *Castlewood International Corp.* v. *Simon*, 367 So.2d 613, 615 (Fla. 1979) (App. B, *infra*, 16a). All other discounts "shall be considered an arrangement for financial assistance by gift" (Fla. Stat. Ann. § 561.01 (10) (West Supp. 1979)), prohibited by § 561.42.

2. a. Respondent Castlewood International Corporation, a large Florida retailer of alcoholic beverages, brought this suit in 1974 in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief against the Secretary of the Treasury. Respondent argued that ATF Ruling 74-6 interpreting 27 U.S.C. 205(b)(3) conflicts with Florida law because it prohibits sales not prohibited under state law and that state law must prevail over conflicting federal law under Section Two of the Twenty-First Amendment.

The district court entered summary judgment for the Secretary (App. C, *infra*, 20a-29a). The court noted that a Florida District Court of Appeals had stated that a discount bearing no reasonable relationship to cost savings accruing to the supplier was not "in the usual course of business" within the meaning of the Florida statute (App. C, *infra*, 24a, citing *Musleh* v. *Fulton Distributing Co.*, 254 So.2d 815, 818-

819 (Fla. Dist. Ct. App. 1971)). Because ATF Ruling 74-6 likewise requires a reasonable relationship between costs and discounts, the district court found no conflict between the federal and state provisions.

The district court further held that even if state and federal law were in conflict, federal law would prevail under the Supremacy Clause. It noted that Florida and the United States enjoy concurrent jurisdiction over the interstate liquor trade actually conducted within Florida. After reviewing this Court's decisions construing the second section of the Twenty-First Amendment, the district court found "nothing in the Twenty-First Amendment which purports to restrict the power of Congress over commerce in intoxicating liquors when such commerce is carried on without violation of state laws, nor does the amendment deny to Congress the power to legislate in aid of state prohibitions" (App. C, *infra*, 27a).

b. On appeal, the Court of Appeals for the Fifth Circuit certified to the Florida Supreme Court the question whether, under Florida law, prices charged to retailers must bear some reasonable relationship to, and be at least equal to, laid-in cost, or whether a wholesaler may sell to a retailer without regard to cost. The Florida Supreme Court held (App. B, *infra*, 12a-19a) that under Florida law, a wholesaler may sell to a retailer at any cost. The size of the discount ceased to be a factor, the court reasoned, following the 1963 amendments to the Florida statute deleting the power of the director of the state beverage department to establish a maximum discount and substitut-

ing in its place the "self-executing" protective requirement that any discount be offered on the same terms to all retailers (App. B, *infra*, 16a-17a, *quoting* 1973 Op. Att'y Gen. Fla. 073-196).[4] The Florida Supreme Court rejected arguments that small retailers unable to take advantage of large discounts would be driven out of business under its interpretation of the Florida statute and that the anti-monopoly purposes of the statute would therefore be better served by reading a "reasonable relationship" test into the state law (App. B, *infra*, 18a-19a).

c. On the basis of the Florida Supreme Court's answer to the certified question, the Fifth Circuit found, without discussion, that "the two regulatory schemes are in conflict as the federal policy creates a floor on wholesale prices below which prices, acceptable under the Florida scheme, may not go" (App. A, *infra*, 5a). The court of appeals then found it necessary to determine "which scheme Florida wholesalers must follow" (*ibid.*).

Turning to the Twenty-First Amendment, the court of appeals found the second section of that Amendment to be "unique in the constitutional scheme" as "the only express grant of power to the states" (App. A, *infra*, 7a). This, the court reasoned (*id.* at 7a-8a), was demonstrated by Congress' decision to delete a proposed section three of the Amendment that would

[4] The Supreme Court of Florida dismissed as dictum the contrary statement by the Florida District Court of Appeals in *Muslek* v. *Fulton Distributing Co., supra*, relied upon by the district court, that a reasonable relationship to cost savings was required.

have given Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." The court acknowledged that the Twenty-First Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries" (*id.* at 9a, *quoting United States* v. *Frankfort Distillers, Inc.*, 324 U.S. 293, 299 (1945)). But the court concluded that the amendment nevertheless demands wide latitude for state regulation of liquor destined for use, distribution, or consumption within the state.

In the latter regard, the court of appeals found it significant that Florida retailers of alcoholic beverages cannot purchase directly from manufacturers, but must instead purchase from wholesalers located within Florida (App. A, *infra*, 9a; see Fla. Stat. Ann. § 561.14(3) (West Supp. 1979)). Thus, in the court's view, the Florida statute touches only wholesalers and retailers within the State of Florida.

Moreover, the court of appeals concluded (App. A, *infra*, 10a-11a) that the presumption of validity attaching to state liquor laws has been overcome in the past only by the overriding constitutional interest in equal protection and due process,[5] or where the State has "invade[d] an area of exclusive federal concern," such as federal enclaves, regulation of foreign com-

[5] Citing *Craig* v. *Boren*, 429 U.S. 190 (1976); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178-179 (1972); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); and *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

merce, and taxation of imports. In the present case, the court found no comparably "strong federal interest" underlying 27 U.S.C. 205(b)(3), as interpreted in ATF Rulings 74-6 and 76-16,[6] and held that the Florida statute must therefore prevail.

REASONS FOR GRANTING THE PETITION

This case presents important questions involving the interplay of state and federal regulation of interstate commerce in liquor. The relationship of the federal government to the States in this area has not been determined by the Court, see *Mississippi Tax Commission* v. *United States*, 412 U.S. 363, 379-381 (1973); *Heublein, Inc.* v. *South Carolina Tax Commission*, 409 U.S. 275, 282 n.9 (1972), although the issue is raised in a related context in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, No. 79-97, which was argued on January 16, 1980.

The court of appeals found a conflict between the Federal Alcohol Administration Act and a Florida law which take somewhat different approaches to fulfilling a shared policy goal of preventing domination of liquor retailers by wholesalers and manufacturers, even though the two laws, operating together, do not subject private parties to inconsistent directives or mutually prevent the accomplishment of their respective legislative purposes. This expansive

[6] ATF Ruling 76-16 was issued between the dates of the district court and court of appeals' decisions.

view of an area of possible conflict is contrary to the Court's decision in *Joseph Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 45 (1966). The court of appeals' view of a conflict in the area, if allowed to stand, could also have a seriously disquieting effect on the accommodation of federal and state law in their long-standing concurrent regulation of the trade in alcoholic beverages.

Moreover, because Florida law does not *require* liquor producers or wholesalers to sell their products below their "laid-in cost," enforcement of Revenue Rulings 74-6 and 76-16 in Florida will not contravene Section Two of the Twenty-First Amendment, even if there is some perceived inconsistency between the federal and state statutory schemes: Section Two of the Amendment prohibits only the transportation or importation of intoxicating liquors into a state for delivery or use "in violation of the laws thereof," and the ATF Rulings do not require a violation of state law. But beyond this, the history of Section Two of the Twenty-First Amendment establishes that it was intended to remove any barriers in the Commerce Clause itself to state prohibition of the importation of alcoholic beverages, principally in aid of the "dry states" that chose to exclude or sharply curtail liquor consumption within their borders. The Amendment was not designed to circumscribe Congress' authority under the Commerce Clause to regulate the inevitable interstate aspects of the liquor trade that would result if the states chose to permit the sale of alcoholic beverages. The court of appeals'

interpretation of the Amendment as subordinating federal regulation of these interstate aspects of the liquor trade to state regulation stands the Supremacy Clause of the Constitution on its head and could have a significant impact on the enforcement of the Federal Alcohol Administration Act and other federal statutes affecting the liquor industry.

1. The court of appeals found it necessary to determine the constitutional question of which regulatory scheme Florida wholesalers must follow only because it found a conflict between the federal and state statutes. However, the court of appeals erred on this threshold question of whether state and federal law are in conflict.

Both the Federal Alcohol Administration Act and Florida law prohibit gifts and other inducements given by wholesalers to retailers in order to prevent the evil of the "tied house." The Secretary of the Treasury defines a prohibited inducement under federal law to include a discount given without a reasonable business justification and concluded that a discount below laid-in cost is presumptively invalid under this test. The Supreme Court of Florida, on certification of the question, held that Florida law does not require that discounts bear a reasonable relationship to cost savings and that discounts *may* therefore result in prices below laid-in cost. But the Florida Supreme Court did not hold that a supplier *must* offer its products below laid-in cost. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 463 (1969). Thus, a liquor supplier in Florida can comply with

both laws by offering any discounts in cash to all retailers on the same terms (as required by Florida law) if those discounts do not result in prices below laid-in cost. In fact, the discounts can be even larger under federal law if the wholesaler can advance a legitimate business reason for them. Thus, this is not a case "where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). See also *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540 (1977).

This is also not a situation in which either the federal or the Florida statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the other. *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 540-541, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Congress broadly prohibited suppliers from giving money or other things of value to retailers to induce them to favor the supplier's products to the exclusion of others offered for sale in interstate commerce. ATF Rulings 74-6 and 76-16 merely seek to make clear what types of discounts will be regarded as improper inducements under this standard. There is no indication that a wholesaler's compliance with the requirements of Florida law, by offering all discounts on the same terms to all retailers, stands as an obstacle to accomplishment of the stated federal purpose of rendering sales below laid-in cost presumptively invalid.

Nor, conversely, is there any indication that a wholesaler's compliance with the guidance offered in the ATF rulings will stand as an obstacle to accomplishment of the purposes underlying the Florida statute. To be sure, the Florida Supreme Court found that the 1963 amendment to the Florida statute "reflected an apparent legislative recognition that major discounts result in lower prices to the consumer as well as a desire by the legislature to require equality in the treatment of retailers, as an alternative to price fixing by the [alcoholic beverage] division" (App. B, *infra*, 17a). But this does not necessarily reflect an affirmative state policy to *encourage* sales to retailers at prices *below cost* to the wholesaler where there is no legitimate business justification for these sales. Such predatory pricing has long been regarded as a violation of federal antitrust legislation, see, *e.g.*, *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963) (Robinson-Patman Act); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911) (Sherman Act). A purpose to encourage such conduct—even assuming state legislation with this purpose would be permissible with respect to alcoholic beverages—should not lightly be ascribed to the State here. The state supreme court held no more than that such conduct is not prohibited by the state law.[7]

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[7] Compare *Wine Industry of Florida, Inc.* v. *Miller*, No. 79-1742 (5th Cir. Jan. 15, 1980), in which the court considered the validity of ATF Ruling 77-4, interpreting 27 U.S.C. 205

Thus, the Florida policy of ensuring the lowest possible prices to retailers (and, thereby, to consumers) in the short run through the free play of market forces, unencumbered by bureaucratic price fixing, is fully consistent with the federal policy embodied in 27 U.S.C. 205(b)(3), as interpreted in ATF Rulings 74-6 and 76-16, of ensuring the lowest possible prices in the long run by eliminating predatory pricing. Cf. *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945). Accordingly, the court of appeals' decision finding a conflict ignored the admonition that "[i]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *Joseph Seagram & Sons* v. *Hostetter*,

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(b)(3) to prohibit wine distributors from stocking retailers' shelves or marking retail prices on the merchandise. The court of appeals (slip op. 2417) noted that in "obvious response" to this ruling, the Florida legislature enacted Section 561.424 of the Florida Statutes Annotated, which includes a legislative finding that such servicing by distributors is not intended to induce a retailer to deal with a certain distributor and expressly provides that nothing in the state beverage law shall be deemed to prohibit the servicing. Thus, in *Wine Industry of Florida, Inc.* v. *Miller*, the Fifth Circuit was confronted with evidence of an affirmative state policy to authorize conduct prohibited by federal law. The court of appeals did not rest its holding on this narrow ground, however. Relying on the Fifth Circuit's decision in the instant case, the panel struck down the ATF Ruling, as applied in Florida, because federal law barred conduct that was merely permissible—*i.e.*, not prohibited—under state law.

384 U.S. 35, 45 (1966), quoting *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 446 (1960). And because there is no conflict between the state and federal statutory schemes, the court of appeals had no occasion to reach the constitutional question of "which scheme Florida wholesalers must follow" (App. A, *infra*, 5a).

The Federal Alcohol Administration Act was passed in 1935, less than two years after ratification of the Twenty-First Amendment. Thus, for almost 35 years, there has been a regime of concurrent regulation of the trade in alcoholic beverages. The court of appeals' erroneous finding of a "conflict" here, if allowed to stand, could upset this delicate interplay of federal and state regulation. Congress learned from experience during Prohibition that, as a practical matter, it cannot impose uniform national standards relating to local sale and consumption of a product that arouses the strong emotions that attend the use of alcoholic beverages; these matters are appropriately left to state regulation.[8]

Conversely, however, manufacturing and wholesale distribution of liquor is national in character, and no state can effectively regulate its interstate aspects and effects. This must, of necessity, be left to the Con-

[8] The fundamental purpose of the Twenty-First Amendment was to return to the states the power to regulate local mores, where Congress' own efforts were singularly unavailing. See, e.g., 76 Cong. Rec. 4143 (1933) (Sen. Blaine), 4144-4148 (Sen. Wagner).

gress.[9] A rule which holds one regulatory system wholly inoperative given any overlap would make uncertain and difficult this continuing interplay of federal and state regulation.

2. Assuming, *arguendo*, that there is a conflict between federal and state law here (or between the purposes each seeks to accomplish), the court of appeals erred in concluding that ATF Rulings 74-6 and 76-16 are invalid as applied in Florida.

a. By its very terms, Section Two of the Twenty-First Amendment prohibits the transportation or importation into a state of intoxicating liquor for use or delivery "in violation of" the laws of that State. Whatever the perceived inconsistency between the ATF rulings and the Florida beverage law, it is clear that the ATF rulings do not require the delivery or use of alcoholic beverages "in violation of" Florida law. As explained above (pages 17-18, *supra*), a wholesaler who complies with the ATF Rulings by declining to sell below its laid-in cost would not be in violation of Florida law as long as it offered discounts in cash on the same terms to all retailers in the State.

b. Nor is there any basis in the history or policies of Section Two of the Twenty-First Amendment for

[9] H.R. Rep. No. 1542, 74th Cong., 1st Sess. 1 (1935); S. Rep. No. 1215, 74th Cong., 1st Sess. 1 (1935) ("State regulation is inadequate, by reason of practical and constitutional limitations, to meet the problems presented" by the national liquor industry). For example, Congress has prohibited most bulk interstate shipment of liquor, something beyond the power of any state, because of the threat it would pose to enforcement of federal and state liquor laws. 27 U.S.C. 206(a); see S. Rep. No. 1215, *supra*, at 4-6.

holding the ATF Rulings unconstitutional as applied in Florida. The court of appeals read Section Two to have worked a "fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors" (App. A, *infra*, 7a). "Thus," the court concluded (*id.* at 8a), "any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes," but must instead "proceed from a vantage point of presumed state power." This presumption of state power can be overcome, under the court of appeals' view, only by a strong countervailing federal interest, such as the protections afforded by the Equal Protection and Due Process Clauses of the Fourteenth Amendment, or where the state seeks to invade an area of exclusive federal concern, such as federal enclaves, commerce with foreign nations, or the taxation of trade with foreign countries.

Although the import of the court of appeals' opinion is not entirely clear, the court's reasoning appears to reverse the normal operation of the Supremacy Clause of the Constitution in all matters pertaining to alcoholic beverages. This reflects a misunderstanding of the purpose of Section Two of the Twenty-First Amendment—which was to prevent an unwilling state from being forced, by operation of the Commerce Clause itself, to accept alcoholic beverages in contravention of a state policy to preclude them or to limit the manner of their consumption. Nothing in the language or history of that Amend-

ment suggests that it was also intended to circumscribe Congress' traditional power to regulate the interstate aspects of the liquor trade in the event that some or all of the states chose to permit the sale and consumption of alcoholic beverages within their borders—at least where, as here, the effect of the federal legislation is not to force the sale of alcoholic beverages in a "dry" state or to regulate the manner of actual consumption in a way that is inconsistent with state policy.

This reading of Section Two is reflected, first, in its very language. The prohibition against "importation or transportation" of intoxicating liquors into a state where its "use or delivery" would be "in violation of" state law embraces deference only to state *prohibitions* of delivery or use of alcohol, not to state policies concerning the commercial aspects of the trade in liquor. This natural reading of the Amendment is also reflected in its history.

In both the Wilson Act, ch. 728, 26 Stat. 313, and the Webb-Kenyon Act, ch. 90, 37 Stat. 699, Congress had sought to overturn prior decisions of this Court holding that the Commerce Clause precluded the states from prohibiting or otherwise burdening liquor moving in interstate commerce.[10] Its purpose in each

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[10] See *Leisy* v. *Hardin*, 135 U.S. 100 (1890). Congress sought to overturn *Leisy* v. *Hardin* in the Wilson Act, *supra*. The Court interpreted the Wilson Act narrowly and strongly suggested that the States could not regulate liquor shipped in interstate commerce until after delivery to a consignee. *Rhodes* v. *Iowa*, 170 U.S. 412 (1898). See Kerr, *The Webb Act*, 22 Yale L.J. 567, 574 (1913) (*Rhodes* held "that a State

case, however, was not to subordinate its own power to that of the states, but merely to relieve the states of the restriction on their power to regulate liquor that the Court found imposed by the Commerce Clause.[11] The second section of the Eighteenth Amendment similarly relieved the states of the Commerce Clause restriction on their inherent police power to regulate liquor. *United States* v. *Lanza*, 260 U.S. 377, 381 (1922).

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liquor law which attempted to attach to a shipment at the border of a State is repugnant to the Constitution as controlling contracts made in another State"). Congress responded by itself "regulating" liquor, declaring that importation of liquor into a state for the purpose of violating state liquor laws was "hereby prohibited." Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U.S.C. 122. The Act provided no penalties for its violation.

[11] Thus, Congress' purpose in enacting the Webb-Kenyon Act was "to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a state" and thus to "permit the state officers * * * to seize such liquors [if] it was intended to be used in violation of the laws of the state * * *." H.R. Rep. No. 1461, 62d Cong., 3d Sess. 1 (1913); see also S. Rep. No. 1060, 62d Cong., 3d Sess. 24-25 (1913).

The law was passed over vigorous constitutional objections and President Taft's veto on constitutional grounds (49 Cong. Rec. 4291-4292 (1913)) on the recommendation of Attorney General Wickersham. *Constitutionality of Proposed Legislation Divesting Intoxicating Liquors of their Interstate Character in Certain Cases*, 30 Op. Att'y Gen. 88, 99-100, 107, 111 (1913).

This Court upheld the Act, acknowledging Congress' limited purpose of relieving the States of the restriction otherwise imposed by the Commerce Clause. *Clark Distilling Co.* v. *Western Maryland Ry.*, 242 U.S. 311, 323-324 (1917); *McCormick & Co.* v. *Brown*, 286 U.S. 131, 140-141 (1932).

In proposing the Twenty-First Amendment, Congress sought to return to the pre-Prohibition status quo by discontinuing its own regulation of local mores and consumption while ensuring the constitutionality of state regulation. Given the uncertain constitutionality of the Webb-Kenyon Act, Congress chose to constitutionalize its substance by writing it into Section Two of the Twenty-First Amendment.[12] At the same time, to avoid repeating what had proven to be an ill-advised attempt to dictate local consumption on a national basis,[13] Congress rejected a proposed section three of the Amendment—commonly known as the anti-"saloon" provision—that would have authorized Congress to regulate the sale of liquor "to be drunk on the premises where sold." But the court of appeals erred (App. A, *infra*, 7a-8a) in reading this rejection of a provision that would have *conferred* on Congress a power to regulate the purely local matter of the consumption of beverages on the premises where sold as evincing a congressional intent to subordinate to state law its *preexisting* regulatory authority over interstate commerce—

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[12] 76 Cong. Rec. 4140, 4141 (1933) (remarks of Sen. Blaine, floor manager) (Section Two will "assure the so-called dry States against the importation of intoxicating liquor into those States"); *id.* at 4170-4171 (Sen. Borah).

[13] 76 Cong. Rec. 4143 (1933) (Sen. Blaine); *id.* at 4144-4145, 4146, 4147-4148 (Sen. Wagner); *id.* at 4172, 4173-4174 (Sen. Borah); *id.* at 4177 (Sen. Walsh of Massachusetts); *id.* at 4220 (Sens. Glass and Reed); *id.* at 4227 (Sen. Bingham).

an authority that Congress could reasonably assume would embrace interstate commerce in intoxicating liquor after ratification of the Twenty First Amendment.[14]

Two years after ratification of the Twenty-First Amendment, Congress in fact exercised what it perceived to be its own residual authority over liquor moving in interstate commerce by enacting the Federal Alcohol Administration Act, which included the "tied house evil" prohibition in 27 U.S.C. 205(b)(3) at issue here. There is no indication that Congress expected this prohibition against financial inducements to retailers to refrain from purchasing other products offered for sale in interstate commerce to be of effect only when it would be wholly consistent with applicable state law or policy. The view of Congress in enacting the Federal Act is entitled to considerable deference because that Act was passed soon after Congress sent the Twenty-First Amendment to the states for ratification.

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[14] In the congressional discussion of the anti-saloon provision, the concern was that concurrent power in Congress to regulate a local practice such as the licensing of saloons, as opposed to Congress' traditional power to regulate interstate commerce, would result in Congress' total abrogation of state power, as happened under the Eighteenth Amendment, and would have been as unenforceable and unmanageable as that amendment had been. See, *e.g.*, 76 Cong. Rec. 4143 (1933) (Sen. Blaine); *id.* at 4143-4148 (Sen. Wagner); *id.* at 4172-4174 (Sen. Borah); *id.* at 4176-4177 (Sen. Walsh of Massachusetts); *id.* at 4220 (Sens. Glass and Read); *id.* at 4227 (Sen. Bingham).

Moreover, in its deliberations on the Federal Alcohol Administration Act, Congress concluded, after careful consideration, that it had retained the power to override certain state laws which did not prohibit or restrict the importation of liquor into the state, even to the point of regulating the conduct of state officials operating state-run liquor monopolies. See H.R. Rep. No. 1542, 74th Cong., 1st Sess. 1-2, 11, 14 (1935); 79 Cong. Rec. 11714 (1935) (Rep. Cullen, sponsor); *id.* at 11712 (Rep. Sabath). Significantly, moreover, Congress had two days previously reenacted the Webb-Kenyon Act to eliminate doubts about its continuing validity. Liquor Law Repeal and Enforcement Act, ch. 740, Section 202, 49 Stat. 877; S. Rep. No. 1330, 74th Cong., 1st Sess. 5 (1935); H.R. Rep. No. 1601, 74th Cong., 1st Sess. 5-6 (1935). Congress could not have intended in Webb-Kenyon (or thus in the Twenty-First Amendment, which incorporated Webb-Kenyon) to subordinate all of its power over the interstate liquor trade to the states, given its exercise of that power two days later expressly to override certain conflicting state law.

The court of appeals considered little of this intricate history of what is concededly an opaque provision. It relied almost entirely on Congress' rejection of the anti-saloon provision, notwithstanding the quite different reasons for rejecting that provision (see pages 26-27, *supra*). And its characterization of the Amendments as "an express grant of power to the states" ignores this Court's repeated holdings that the states enjoy inherent police power to regulate the

liquor traffic, and that the second section of the Twenty-First Amendment simply operated to relieve the states of restrictions on that power deriving from the Commerce Clause. *Craig* v. *Boren*, 429 U.S. 190, 206 (1976); *Heublein, Inc.* v. *South Carolina Tax Commission, supra*, 409 U.S. at 283; *Joseph Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 42 (1966); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 344, 346 (1964); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939).

3. The court of appeals' decision threatens not only the effectiveness of the Federal Alcohol Administration Act, but also a broad range of federal laws as they apply to the liquor industry. Liquor dealers are now relying on the decision below to defend against charges of violation of the Federal Act, asserting an immunity deriving from compliance with state law.[15] The decision below is also relied upon in a challenge to recent Treasury Department regulations respecting bottle size [16] and wholesaler servicing of retail establishments.[17] Important and carefully considered federal policies, such as those pertaining to the labeling of liquor bottles, 27 U.S.C. 205(e),[18] could also be subject to the inconsistent preferences of every State under the logic of the court's decision. Even Congress' power to prohibit bulk sales, originally designed to protect dry states from the illegal importation of liquor from wet states,[19] might have to fall before a state's election to permit such sales.

The effect on federal law other than that specifically referring to liquor could also be profound. Many federal laws of general application, like the Sherman Act at issue in *California Retail Liquor Dealers, supra*, might be subject to piecemeal dismemberment as they apply to the liquor industry throughout the Nation, despite Congress' intent to override conflicting state law or to occupy a field. To cite only a few examples, a state might declare that union organization of liquor industry employees facilitates the involvement of organized crime, and accordingly prohibit liquor industry employees from exercising some or all of their rights under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to organize, engage in collective bargaining, or strike. States might seek to prohibit disclosure of important corporate information in securities of liquor corporations where disclosure would otherwise be required under the Securities Act of 1933, 15 U.S.C. 77a *et seq.* Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969). To protect

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[15] See *National Distributing Co.* v. *U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms*, No. 78-2303 (D.C. Cir.); *Appellant's* [*sic*] *Memorandum Regarding Castlewood International Corp.* v. *Simon*, at 1-2.

[16] See *Overbrook Egg Nog Corp.* v. *Miller*, Civil No. K-79-2614, (D. Md.).

[17] See *Wine Industries of Florida, Inc.* v. *Miller, supra.*

[18] See H.R. Rep. No. 1542, *supra*, at 14.

[19] S. Rep. No. 1215, *supra*, at 4-6; H.R. Rep. No. 1542, *supra*, at 10.

itself from illegal diversion of liquor, a State might even seek to require special licenses for interstate common carriers handling liquor and so deny authority to carriers whose service was authorized by the Interstate Commerce Commission in the "public convenience and necessity." Pub. L. No. 95-473, 92 Stat. 1409 (to be codified at 49 U.S.C. 10922(a)(2)).[20] The court of appeals' decision, by introducing a strong presumption in favor of state interests, could encourage litigation threatening federal policies in these and other areas. And its reasoning could result in rejection of important, long-established federal policies in favor of the particular views and interests of the various states on matters unrelated to the right of the states to control the importation of alcohol within their borders—the core interest on which the Twenty-First Amendment is based.

[20] See *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (Motor Carrier Act); cf. *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939). See also *Chicago* v. *Atchison, T. & S.Fe Ry.*, 357 U.S. 77 (1958); *Railroad Transfer Service* v. *Chicago*, 386 U.S. 351 (1967); *Bowman* v. *Chicago & N.W.Ry.*, 125 U.S. 465 (1888).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[21]

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JANUARY 1980

[21] The Court may wish to hold this petition pending its decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-4445

CASTLEWOOD INTERNATIONAL CORPORATION,
a Florida Corporation, PLAINTIFF-APPELLANT

v.

WILLIAM SIMON, As Secretary of the Treasury of the United States and REX DAVIS, as Director of the Bureau of Alcohol, Tobacco and Firearms, DEFENDANTS-APPELLEES

June 6, 1979

Appeal from the United States District Court for the Southern District of Florida

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

FAY, Circuit Judge:

Plaintiff-appellant, Castlewood International Corporation (Castlewood), is incorporated under and licensed by the State of Florida as a retail vendor of alcoholic beverages. Castlewood is among the largest retail vendors in Florida, with more than ninety retail outlets throughout the state. In December, 1974, Castlewood brought suit in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief against enforcement

in Florida of rulings issued by the Bureau of Alcohol, Tobacco and Firearms (ATF) of the United States Department of Treasury. The District Court granted summary judgment for the United States. Castlewood appeals. For reasons more fully developed below, we reverse.

The Florida liquor industry is governed by a complex and comprehensive statutory scheme, F.S.A. §561.01 et seq. The industry is statutorily divided into three separate and distinct levels: (1) manufacturer, (2) the wholesaler, and (3) the retail vendor. As a retail vendor, Castlewood may purchase only from Florida wholesalers (distributors), F.S.A. § 561.14(3). F.S.A. § 561.42(1) provides that no licensed distributor shall "assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever." Distributors may, however, give "trade discounts in the usual course of business," F.S.A. § 561.42(6), provided that: (1) the discount be given simultaneously with the sale, and (2) the distributor offers the same discount to all vendors buying similar quantities of liquor. F.S.A. § 561.01(10). Thus, under Florida's regulatory scheme, the distributor and the retailer are free to negotiate a mutually acceptable selling price regardless of whether the price is at, above or below the distributor's cost. Once a price has been agreed upon, the wholesaler is obligated to treat all retailers fairly and equally by offering the same price discount to all retail vendors. This so-called "Tied House Evil" law prevents a

wholesaler from giving a substantial discount to a particular retail vendor, thereby eliminating discriminatory pricing and trade favoritism.

The Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.* regulates manufacturers and wholesalers, but not retail vendors, of alcoholic beverages. The federal Tied House Evil Law, 27 U.S.C. § 205 (b), prohibits manufacturers and wholesalers from giving any money or other things of value to a retail vendor. In 1954, the Internal Revenue Service issued Rev.Rul. 54-161, 1951-1 C.B. 338, as a guideline to the industry to indicate when a violation of 27 U.S.C. § 205(b) might occur.[1] In 1974, ATF issued an "amplification" of Rev.Rul. 54-161 which required a reasonable relationship between a discount and a savings in cost accruing to a distributor before a wholesaler could grant any discount to a retailer. ATF Rule 74-6. ATF stated that unless a wholesaler could specifically justify otherwise, any price charged a retail vendor which was less than a wholesaler's "laid-in cost plus total operating cost" would be considered a violation of the Tied House

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[1] Rev.Rul. 161, 1954-1 Cum.Bull. 338. The ruling indicated that so-called free goods, discounts, rebates, refunds, and price reductions given to retailers pursuant to an agreement made at the time of sale are merely methods used to arrive at an agreed price and as such do not come within the purview of the Federal Alcohol Administration Act. The ruling did provide, however, that if free goods, discounts, rebates, etc., are such that the pricing aspect is merely a subterfuge, the transaction would constitute a "gift" within the meaning of 27 U.S.C. § 205(b)(3).

Evil Law.[2] The amplification was designed to prevent "discounts" from being used by wholesalers as a device for giving prohibited financial assistance to retail vendors.

Plaintiffs sued to declare void and enjoin enforcement of the amplification ruling. Both parties stipulated that no genuine issues of material fact were in dispute and the district court considered the matter on defendant's motion for summary judgment. The district court, relying on an interpretation of the Florida law provided by the First District Court of Appeals of that state, held that there was no conflict between the Florida law and ATF Rul. 74-6. Moreover, the district court alternatively considered the conflict allegations and held that even if a conflict were found to exist, the federal rulings, by virtue of the Commerce Clause of the Constitution, must prevail.

Desirous of a definitive interpretation of the Florida Statute, we certified the following question to the Supreme Court of Florida:

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[2] ATF Ruling 74-6 provided that:

> in considering whether a discount is in fact a method of arriving at an agreed sales price and not a subterfuge, the Bureau holds there must be a reasonable relationship between the discount and the purpose for which it is granted, i.e., a discount given in connection with a volume purchase must bear a reasonable relationship to the savings and cost accruing to the supplier in the manufacture, sale or delivery of the product.

This ruling has been amended since its promulgation. However, the subsequent rulings still hold that the sales price to retail vendors must bear a relationship to the "laid-in cost."

> Whether, under Florida's comprehensive regulatory scheme for the alcoholic beverage industry, prices charged by wholesalers to retailers must bear some relationship to, and be at least equal to laid-in cost, or whether a wholesaler may sell to a retailer at any price, regardless of laid-in cost, provided only that all discounts are given at the time of sale and the same discount is available to all purchasers of similar quantities of alcoholic beverages.

The Florida Supreme Court held that "under Florida law a wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in cost or the savings attributable to quantity sales." *Castlewood International Corp.* v. *Simon*, Fla., 367 So.2d 613 (1979), *rehearing denied*, (Mar. 12, 1979).

Armed with this interpretation of the Florida Statute, it is apparent that the two regulatory schemes are in conflict as the federal policy creates a floor on wholesale prices below which prices, acceptable under the Florida scheme, may not go. We must therefore address the issue of which scheme Florida wholesalers must follow.

Liquor occupies a unique position among items of commerce insofar as the Commerce Clause is concerned. Its unique position is due to the Twenty-first Amendment, the second section of which provides:

> The transportation or importation into any State, Territory, or possession of the United States for

delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states. *In the License Cases*, 46 U.S. (5 How.) 504, 579, 12 L.Ed. 256 (1847), the Supreme Court recognized broad authority in state governments over trade in alcoholic beverages within their borders, noting that insofar as alcoholic beverages were concerned, states were free from the implied restrictions of the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. After *Leisy* v. *Hardin* undercut that power, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128 (1890), Congress passed the Wilson Act [3] and the Webb-Kenyon Act,[4] exer-

[3] 26 Stat. 313 (1890), 27 U.S.C. § 121 (1976). The Wilson Act attempted to give the states the power to regulate liquor shipped into the state to the same degree that the states could regulate liquor produced in the state. The Wilson Act was given a narrow construction by the Supreme Court. In *Rhodes* v. *Iowa*, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088 (1898), the Court held that the "interstate character" of liquor remained until it was delivered to the consignee, and until it lost that interstate character, it was beyond the scope of state regulation. Thus, so long as liquor was in the process of transportation, the power to regulate remained exclusively with the federal government.

[4] 37 Stat. 699 (1913), 27 U.S.C. § 122 (1976). The Act prohibited shipment of liquor into a state in violation of that state's laws, and sought to divest intoxicating liquors of their interstate character in certain situations. The Act was upheld as a legitimate exercise of the Commerce power in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917).

cising its Commerce Clause powers in an attempt to reinvigorate the state's role in alcoholic regulation. Passage of the Eighteenth Amendment temporarily ended "the uneasy tension between the Commerce Clause and state police power . . . ." *Craig* v. *Boren*, 429 U.S. 190, 205, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976).

In 1933, this "noble experiment" was ended with the ratification of the Twenty-first Amendment. Had the Twenty-first Amendment merely contained its first clause,[5] the control of liquor would have reverted to the pre-Eighteenth Amendment status. But the Twenty-first Amendment did more. Section 2 constitutionalized an exception to the normal operation of the Commerce Clause. *Craig* v. *Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). That section is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors. See *California* v. *LaRue*, 409 U.S. 109, 115, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972).

There can be no doubt that this was the desire of those who framed the Twenty-first Amendment. As originally proposed, the Amendment contained three substantive sections, the third of which provided:

[5] "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. amend. XXI, § 1.

> Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

76 Cong. Rec. 4138 (1933). Section Three was deleted because of Congressional concern that its grant of concurrent power to regulate liquor to Congress would be construed to support the supremacy of federal regulation of liquor sales. As Senator Wagner pointed out, "We have expelled the system of national control through the front door . . . and readmitted it forthwith through the back door of Section 3." 76 Cong.Rec. 4145 (1933). This would have been the "ironical result of an amendment designed to restore to the states control of their liquor problem." *Id.* With these concerns in mind, Section Three was deleted in the final version of the amendment.

Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.

This unique constitutional structure has created problems for the courts, giving rise to seemingly conflicting analyses. The frontiers of this state power is unclear. While the Supreme Court has stated that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders," *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350 (1964), it has also indicated that the "second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed. 2d 336 (1966). And so, while the Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries," *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 299, 65 S.Ct. 661, 89 L.Ed. 951 (1945), the Twenty-first Amendment "demands wide latitude for regulation by the State" where liquor destined for use, distribution, or consumption is entirely within the state. *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 46 L.Ed.2d 336 (1966).

In the instant case, the Florida Statute concerns only liquor sold to Florida retailers. Florida retailers may not purchase directly from the manufacturer but rather, must purchase from a wholesaler located within the state. Fla.Stat. § 561.14(3). In other words, the Florida provision touches and concerns only wholesalers and retailers within the state of Florida. There can be no doubt that this is a valid exercise of Florida's police power, as recognized by the Twenty-first Amendment. *See Seagram & Sons,*

Inc. v. *Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed. 2d 336 (1966) (New York liquor pricing regulation requiring reference to wholesaler prices throughout the nation poses no Commerce Clause problem).

And yet, the government argues that the Federal Alcoholic Administration Act, 27 U.S.C. § 201 et seq., pursuant to which the federal regulations here challenged were promulgated, must prevail due to the Supremacy Clause of the Constitution. U.S.Const. art. VI, § 2. We cannot agree.

Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) where the state regulation was repugnant to overriding national concern with due process [6] and equal protection,[7] and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations,[8] regulation of commerce with foreign nations,[9] and taxation of imports from foreign

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[6] *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1970); *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

[7] *Craig* v. *Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178-179, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

[8] *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938). *See* U.S. Const. art. 1, § 8, cl. 17.

[9] *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). *See* U.S. Const. art. 1, § 8, cl. 3.

countries.[10] Thus, absent a strong federal interest, the state scheme must prevail. No interest of sufficient magnitude is advanced in support of ATF Ruling 74-6. Accordingly, we hold that insofar as ATF Ruling 74-6 and Florida Statute § 561.42(6) conflict, the Florida Statute must prevail. Accordingly, we reverse the holding of the district court and remand this action so that the district court may enter its order in accordance with this opinion.

REVERSED AND REMANDED.

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[10] *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 78, 11 L.Ed.2d 48 (1964). *See* U.S. Const. art. I, § 19, cl. 2.

APPENDIX B

SUPREME COURT OF FLORIDA

No. 53,146

CASTLEWOOD INTERNATIONAL CORPORATION, ETC., APPELLANT

vs.

WILLIAM SIMON, *et al.*, APPELLEES

[January 11, 1979]

ENGLAND, C. J.

This case comes to us by certification from the Fifth Circuit Court of Appeals, asking for an interpretation of the financial restrictions imposed by Florida law on transactions between wholesalers and retailers of alcoholic beverages. Critical to our answer are the history of Florida's regulatory provisions on the subject and a comparison with comparable features of the federal regulatory scheme.

Pursuant to the authority reserved to the several states by the twenty-first amendment to the United States Constitution,[1] Florida has adopted a compre-

[1] U.S. Const. amend. XXI, § 2 provides: "The transportation or importation into any State . . . for delivery or use

hensive regulatory scheme to control the distribution and sale of intoxicating liquors within this state.[2] A dominant feature of Florida's regulatory scheme is the establishment of three independent tiers of private entities concerned with the distribution and sale of intoxicating liquors in the state—distillers, wholesalers, and retailers.[3] Since 1935, when Florida enacted a counterpart of the federal Tied House Evil Statute,[4] this state has prohibited distillers and wholesalers of intoxicating liquors from offering financial assistance to retailers.[5]

Both the state Tied House Evil Law and a rule promulgated by the Treasury Department under the federal statute allow one form of inter-tier financial assistance—trade discounts from wholesalers to retailers "in the usual course of business." [6] Florida and

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therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

[2] Title 32, Fla. Stat. (1977).

[3] § 561.14, Fla. Stat. (1977). A fourth class—exporters—is strictly prohibited from engaging in any in-state liquor business, see Division of Beverage v. Bonanni Ship Supply, Inc., 356 So.2d 308 (Fla. 1978), and therefore is unaffected by the present controversy.

[4] See 27 U.S.C. § 205(b) (1976).

[5] The present prohibition is found in § 561.42(1), Fla. Stat. (1977), which provides:

> "No licensed manufacturer or distributor of [alcoholic beverages] shall . . . assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever."

[6] § 561.42(6), Fla. Stat. (1977); Rev. Rul. 161, 1954-1 C.B. 338.

federal law differ, however, as to what that terminology permits. At the present time, federal regulations allow discounts only to the extent that volume purchases bear a reasonable relationship to the savings in cost which accrue to the wholesaler, and they prohibit any transaction in which the discount would result in a sales price below the wholesaler's "laid-in cost." [7] Florida's statute authorizes trade discounts in cash, if given simultaneously at the time of sale to all retailers buying similar quantities, without any mention of a required relationship between discount and savings, or of a "floor" on discounts.[8] This difference between Florida and federal law precipitated this lawsuit, raising the question of whether Florida's liquor wholesalers must conform their price schedules to meet the requirements of the federal regulatory scheme.

Castlewood International Corporation is a retail vendor of alcoholic beverages in Florida, licensed under Chapter 561, Florida Statutes (1977). It brought an action in the United States District Court for the Southern District of Florida, seeking declaratory and injunctive relief against the enforcement in Florida of the federal regulations. Castle-

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[7] See Bureau of Alcohol, Tobacco and Firearms Rulings 74-6 and 75-5.

[8] § 561.01(10), Fla. Stat. (1977), defines a "discount in the usual course of business" to mean

> "a cash discount given simultaneously at the time of sale. The same discounts shall be offered to all vendors buying similar quantities."

wood argued, essentially, that Florida is free to adopt a regulatory scheme for the control of intoxicating liquors which is different from the federal scheme; that the state has broad discretion to control or limit financial assistance between tiers in the liquor distribution chain; that the state may elect to place a "floor" on inter-tier discounts or require a cost-savings relationship but it may also elect "equality among purchasers" as a mechanism of control; and that since 1963 Florida has elected the latter, allegedly more competitive method for this state.

The federal district court rejected Castlewood's contentions and entered judgment for defendants, the Secretary of the Treasury and the Director of the Bureau of Alcohol, Tobacco and Firearms.[9] On appeal, the United States Court of Appeals for the Fifth Circuit certified the following question to us pursuant to Florida Appellate Rule 4.61: [10]

> "Whether, under Florida's comprehensive regulatory scheme for the alcoholic beverage industry, prices charged by wholesalers to retailers must bear some relationship to, and be at least equal to, laid-in cost, or whether a wholesaler may sell to a retailer at any price, regardless of laid-in cost, provided only that all discounts are given at the time of sale and the same discount is avail-

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[9] Castlewood International Corp. v. Simon, 404 F. Supp. 88 (S.D. Fla. 1975).

[10] This rule now appears as Florida Rule of Appellate Procedure 9.510 (1977). See also § 25.031, Fla. Stat. (1977).

> able to all purchasers of similar quantities of alcoholic beverages." [11]

We hold that under Florida law a wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in cost or the savings attributable to quantity sales.

Before 1963, a "discount in the usual course of business" was defined by Section 561.01(13), Florida Statutes (1961), to mean

> "a cash discount given simultaneously at the time of sale, which shall not exceed the allowable discount fixed by the director [of the state beverage department]."

In that year the authority of the director was replaced with a statutory prescription for unregulated equality among purchasers, the provision now found in Section 561.01(10), Florida Statutes (1977).[12]

In 1973, the Board of Business Regulation asked the Attorney General precisely the same question regarding the effect of the 1963 amendment which the Fifth Circuit has now certified to us. We cannot improve on the Attorney General's answer, which has continuing vitality under the statute as it presently exists.

> "The terms of the amendment are unambiguous and the legislative intent is clear. The criterion

[11] Castlewood International Corp. v. Simon, 564 F.2d 695, 698 (5th Cir. 1977).

[12] Ch. 63-32, § 1, Laws of Fla.

> based upon the size of the discount was removed from the definition and the concomitant authority of the director to adopt rules setting the size of the allowable discount was withdrawn. In lieu thereof, the legislature adopted a new, self-executing criterion. The size of the discount is no longer a factor. So long as it is a cash discount given simultaneously at the time of sale and so long as the same discount is offered to all vendors buying similar quantities, it is a discount in the usual course of business and thus exempted from § 561.42 by subsection (6). Under the amended section, it is a violation of 'this section' rather than a rule which is considered an arrangement for financial assistance or gift. This change reflected an apparent legislative recognition that major discounts result in lower prices to the consumer as well as a desire by the legislature to require equality in the treatment of retailers, as an alternative to price fixing by the division." [13]

There is no other administrative or judicial interpretation of the statute in Florida, although there is a sentence in a 1971 decision of the First District Court of Appeal which, contrary to the Attorney General's opinion, states that a reasonable relationship to cost savings is required under the amended discount statute.[14] This statement in that opinion was

[13] 1973 Op. Att'y Gen. Fla. 073-196 (June 1, 1973). This construction of the statute has been accepted by the Department of Business Regulation, which in 1976 promulgated an administrative rule embodying the same limited test. See Fla. Admin. Code Rule 7A-4.461.

[14] Musleh v. Fulton Distributing Co., 254 So.2d 815, 818-19 (Fla. 1st DCA 1971).

obviously gratuitous, as the subject of the present controversy was neither argued nor briefed by the parties there and was irrelevant to the point of law involved in that proceeding.[15] We now hold that the 1973 opinion of the Attorney General accurately reflects the intent of the legislature and the law of this state with respect to discounts offered by wholesalers of wines and liquors.

The appellees and amici [16] argue forcefully that the interpretation we have now adopted will enable those retailers who are licensed to sell liquor at multiple locations to obtain a favorable competitive position over individual businesses, since as a practical matter the latter will be unable to take advantage of the discounts offered on large volume orders.[17] They suggest that unless a cost-relationship requirement is incorporated into the statute, individual retailers will ul-

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[15] Both the rule and statute which authorize our acceptance of certified questions from federal appellate courts specifically provide that we may only address issues for which "there are no clear controlling precedents in the decisions of the [Florida] Supreme Court." This case proves the wisdom of that limitation. The Fifth Circuit recognized the significance of this condition, having declined to accept *Musleh* as controlling authority. 564 F.2d at 696 n.1.

[16] Distilled Spirits Wholesalers of Florida, Inc. and Wine Industry of Florida, Inc.

[17] This may or may not occur. The Division of Beverage, undoubtedly in recognition of this potential inequity, has promulgated a rule establishing a method by which two or more licensed vendors may "pool" their purchases from a distributor in order to obtain the large volume discounts which might otherwise be available only to multi-outlet retailers. Fla. Admin. Code Rule 7A-4.50.

timately be driven out of business and wholesalers will be at the mercy of the large, multi-outlet vendors. To sustain this position, they urge that we look not only to the object and intent of the beverage law, but beyond to general state and federal legislation aimed at preventing unfair trade practices.

We have often said that the courts will not substitute what is perceived to be a more desirable or harmonious policy for a clear and unambiguous legislative directive. See, for example, *Heredia* v. *Allstate Insurance Company*, 358 So.2d 1353, 1355 (Fla. 1978). That doctrine of judicial restraint is directly applicable here.[18] Appellees' concerns regarding monopolistic practices go not to the meaning, but to the wisdom of the provisions in question—a matter which is irrelevant to our inquiry.[19]

For the reasons expressed, the question certified by the Fifth Circuit Court of Appeals is resolved in accordance with this opinion.

BOYD, OVERTON and HATCHETT, JJ., Concur.

ADKINS, J., Concurs in result only

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[18] In passing we note that the federal government did not place any limit on distributors' discounts under the federal Tied House Evil Statute for the period between 1935 and 1974. The fact that the federal government has now altered its policy is not a persuasive reason to incorporate its current view into the comparable Florida statute.

[19] E.g., Stern v. Miller, 348 So.2d 303, 307 (Fla. 1977); State v. Reese, 222 So.2d 732, 736 (Fla. 1969); Overstreet v. Bishop, 343 So.2d 958, 961 (Fla. 1st DCA 1977).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 74-1633-Civ-JLK

CASTLEWOOD INTERNATIONAL CORPORATION,
a Florida corporation,

vs.

WILLIAM SIMON, as Secretary of the Treasury of the United States and REX DAVIS, as Director of the Bureau of Alcohol, Tobacco and Firearms,
DEFENDANTS

ORDER

This cause came before the Court as plaintiff's action for injunctive relief and declaratory judgment seeking to declare void and to enjoin the enforcement of rulings issued under the Federal Alcohol Administration Act by the United States Bureau of Alcohol, Tobacco and Firearms. The Court, having considered the record and being fully advised in the premises, finds and concludes that plaintiff's claim should be denied and Summary Judgment be entered in favor of the defendants.

FINDINGS OF FACT

Section 205 of the Federal Alcohol Administration Act, (hereinafter The FAA Act), 27 U.S.C. § 205, is directed to wholesalers of alcoholic beverages and

established certain trade practice violations. In 1954 the Bureau of Alcohol, Tobacco and Firearms (hereinafter the Bureau of ATF), issued Revenue Ruling 54-161 which established guidelines as to acts which would constitute a violation of the FAA Act. The final sentence of the ATF Ruling specified:

> However, if the amount of the product given free with the order is such that the pricing aspect is merely a subterfuge, the transaction would constitute a gift within the meaning of this section of the FAA Act.

In February of 1974, the Bureau of ATF issued Industry Circular 74-2, which notified the regulated wholesale industry of a forthcoming ATF Ruling which would provide background and purpose information regarding the forthcoming Ruling. The Circular and subsequent Ruling were regarded by the Bureau of ATF as amplification and clarification of Revenue Ruling 54-161 and stated in part:

> In considering whether a discount is in fact a method for arriving at an agreed price and not a subterfuge, the Bureau holds there must be a reasonable relationship between the discount and the purpose for which it is granted, i.e., a discount given in connection with a volume purchase must bear a reasonable relationship to the savings in cost accruing to the supplier in the manufacture, sale, or delivery of the product.

Circular 74-2 was subsequently adopted as ATF Ruling 74-6. Industry Circular 74-2, ATF Ruling 74-6 are the primary documents which brought this issue before the Court.

Plaintiff and defendants in this cause filed lengthy supporting memoranda discussing all legal issues raised by plaintiff's complaint. Oral argument was held, and plaintiff and defendants ably presented the legal questions to the Court. The Court has considered all aspects of this case and in this opinion wishes to address itself to plaintiff's allegations that as the ATF Ruling conflicted with Florida state statutory schemes, the Ruling was in violation of the Twenty-First Amendment and the Bureau of ATF acted beyond the scope of its statutory jurisdiction and authority.

CONCLUSIONS OF LAW

I.

THE COURT HAS JURISDICTION.

It is a settled matter of law that a federal district court has jurisdiction to hear cases where the amount in controversy exceeds $10,000 and where there is a federal question which arises under the Constitution, laws or treaties of the United States. The Court took jurisdiction of the present case pursuant to the plaintiff's good faith allegations predicated upon 28 U.S.C. § 1331 and issues arising under the laws and Constitution of the United States.

II.

ATF RULINGS ARE NOT IN CONFLICT WITH FLORIDA STATE LAW, BUT IF SUCH CONFLICT DID EXIST, FEDERAL LAW PREVAILS.

The question of whether a conflict exists between federal and Florida state law rests upon the specific facts before the Court. In the instant case plaintiff is relying primarily upon Florida state law, particularly Florida Statutes §§ 561-568, which provide for regulation of the beverage industry within the State of Florida. Section 561.01(10) of Title XXXII of the Florida Code defines the terms "discount in the usual course of business" to mean "a cash discount given simultaneously at the time of sale. The same discounts shall be offered to all vendors buying similar quantities. Any discount which is in violation of this section shall be considered an arrangement for financial assistance by gift." Section 561.42(1) provides that no licensed distributor shall assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any . . . licensed distributor; . . ." Section 561.42(6) provides that nothing in section 561.42 "shall be taken to forbid the giving of trade discounts in the usual course of business upon wine and liquor sales." Plain-

tiff also relies upon Attorney General Opinion 073-196, State of Florida, 1973, wherein the Attorney General of Florida said:

> The size of the discount is no longer a factor. So long as it is a cash discount given simultaneously at the time of sale and so long as the same discount is offered to all vendors buying similar quantities, it is a "discount in the usual course of business" and thus exempted from Section 561.42 by Subsection (6). Under the amended Section it is a violation of "this section" rather than a rule which is considered an arrangement for finanical assistance or gift. This change reflected an apparent legislative recogniture that major discounts result in lower prices to the consumer, as well as a desire by the Legislature to require equality in the treatment of retailers, as an alternative to price fixing by the Division.

After examination of Florida statutory and case law, the Court feels that the State of Florida has spoken. In the case of *Musleh* v. *Fulton Distributing Company of Florida*, 254 So. 2d 815, 818, 819 (Fla. 1971) the Court of Appeals held that "a volume discount allowed by a wholesaler or distributor to a retail vendor is not made 'in the usual course of business' if it bears no reasonable relationship to the savings in cost accruing to the wholesaler or distributor in the manufacture, sale or delivery of the product sold." It is clear that this language is not in conflict with that contained in ATF Industry Circular 74-2, ATF Ruling 74-6.

The Court does not question plaintiff's allegations that the ATF rulings have had a cause and effect result and wholesalers have increased prices. However, the Court finds no clear and direct conflict between Florida law and the ATF rulings at issue. In *Joseph E. Seagram & Sons, Inc* v. *Hostetter*, 384 U.S. 35, 45 (1966) the Supreme Court said:

> In this as in other areas of coincident federal and state regulations, the "teachings of this Court's decisions . . . enjoin[s] seeking out conflicts where none clearly exists.: *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 446 (1960).

This Court has alternatively considered the conflict allegations in the case at bar and holds that even if a conflict were found to exist, the federal rulings must prevail.

The Eighteenth Amendment to the Constitution of the United States prohibited the manufacture, sale, or transportation of intoxicating liquors within, into or from the United States and all its territories. Prior to the passage of the Eighteenth Amendment, the regulation of liquor traffic was a matter solely of local concern except as circumscribed by the Commerce Clause of the Constitution. *Washington Brewers Institute* v. *United States*, 137 F. 2d 964 (9th Cir. 1943), *cert. denied*, 320 U.S. 776 (1943), citing: *The License Cases*, 46 U.S. 504 (1847); *Bowman* v. *Chicago & N.W.R. Co.*, 125 U.S. 465 (1887); and *Leisy* v. *Hardin*, 135 U.S. 100 (1889).

The Twenty-First Amendment was ratified in 1933 and, in addition to repealing the Eighteenth Amendment, provided in Section 2 that:

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The United States Supreme Court has consistently held,

> "That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951. Cf. *Nippert* v. *City of Richmond*, 327 U.S. 416, 425, n. 15, 66 S.Ct. 586, 590, 90 L.Ed. 760. Just two Terms ago we took occasion to reiterate that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." . . ., however, the second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor. 384 U.S. at 42.

It is clear to this Court that where activities in intrastate commerce substantially affect interstate commerce, Congress has the power to regulate such intrastate activities. *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *United States* v. *Ferger*, 250 U.S. 199 (1919); *United States* v. *Darby*, 312 U.S. 100 (1940); *Curnin* v. *Wallace*, 306 U.S. 1 (1939).

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1963). The Court finds nothing in the Twenty-First Amendment which purports to restrict the power of Congress over commerce in intoxicating liquors when such commerce is carried on without violation of state laws, nor does the amendment deny to Congress the power to legislate in aid of state prohibitions. "The ability on the part of the states to restrict liquor traffic in no way deprives the federal government of concurrent jurisdiction. Beyond a doubt the states have been given broad surveillance over liquor business within their boundaries, but it is equally certain that their jurisdiction is not plenary and exclusive." *Hanf* v. *United States*, 235 F.2d 710, 718 (8th Cir. 1956), *cert. denied*, 352 U.S. 880 (1956). See also: *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 299 (1944); *Arrow Distilleries* v. *Alexander*, 109 F.2d 394 (7th Cir. 1940), *cert. denied*, 310 U.S. 646 (1940); *Washington Brewers Institute* v. *United States*, 137 F.2d 964 (9th Cir. 1943), *cert. denied*, 320 U.S. 776 (1943); *Duckworth* v. *State of Arkansas*, 314 U.S. 390 (1940).

It is clear to this Court that the Twenty-First Amendment demands the states be given broad powers and discretion to regulate the liquor industry

within its borders. However, in the present case the Court agrees with the Supreme Court's decision in the *Seagram* case, *supra*, at p. 42, 43:

> . . . We need not now decide whether the mode of liquor regulation chosen by a State in which circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. No such situation is presented in this case.

III.

THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS DID NOT ACT ARBITRARILY OR CAPRICIOUSLY OR BEYOND THE SCOPE OF ITS JURISDICTION OR AUTHORITY.

The Court finds there is no merit in plaintiff's argument that the Bureau of ATF acted beyond the scope of its jurisdiction and statutory authority. The Court has determined that defendants in this case have specific authority to issue rulings and advisory opinions interpreting the FAA Act within general powers granted under 26 C.F.R. § 601.328. Additionally, rulings and advisory opinions are expressly warranted within 27 U.S.C. § 205(b) for the purpose of informing the regulated industry of ATF interpretations of the FAA Act.

In the present case, the Court may review administrative decisions to determine whether agency action was arbitrary and capricious. *Gibson Wine Co.* v. *Snyder*, 194 F.2d 329 (D.C. Cir. 1952); *Continental Distilling Corp.* v. *Humphrey*, 220 F.2d 367 (D.C.

Cir. 1954). After full and careful review, the Court finds that the actions taken by the Bureau of ATF were neither arbitrary nor capricious and were within that agency's jurisdiction and authority. Under the circumstances in the present case, to decide otherwise would be to proscribe the agency's powers to investigate and enforce its own laws. The placing of such limitations is clearly not within the intent of Congress when it enacted the FAA Act. See, *Legislative History of Federal Alcohol Administration Act*, H.R. 8870, p. 18; *Treasury Department Order* No. 221, 37 F.R. 11696, 26 C.F.R. § 601.328; *Report of the Attorney General's Committee On Administrative Procedure* (1941), p. 99.

Therefore, after due consideration of the complete record in the present case, it is

ORDERED AND ADJUDGED that defendants' Motion for Summary Judgment be and the same is hereby granted.

Done and Ordered in Chambers at Miami, Florida, this 18th day of November, 1975.

United States District Judge

c.c.—Tobias Simon, Esquire
AUSA Patricia Jean Kyle

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4445

D.C. Docket No. CA 74-1633 JLK

CASTLEWOOD INTERNATIONAL CORPORATION, a Florida Corporation, PLAINTIFF-APPELLANT

versus

WILLIAM SIMON, As Secretary of the Treasury of the United States, and REX DAVIS, As Director of the Bureau of Alcohol, Tobacco and Firearms, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment in the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendants-Appellees pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 6, 1979

ISSUED AS MANDATE:

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4445

CASTLEWOOD INTERNATIONAL CORPORATION,
A Florida Corporation, PLAINTIFF-APPELLANT

versus

WILLIAM SIMON, As Secretary of the Treasury of the United States, and REX DAVIS, As Director of the Bureau of Alcohol, Tobacco and Firearms, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(August 29, 1979)

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge

Form 703-2

APPENDIX F

ATF Ruling 76-16.

The response from industry following the publication of ATF Ruling 74-6, ATF C.B. 1974, 50, which related to practices employed by some industry members who furnished retailers with inordinate amounts of free goods and or substantial price reductions, volume discounts, rebates, and refunds, indicated that the ruling had been interpreted as a shift in the Bureau's position concerning pricing. Actually, the intent of the ruling was to merely re-emphasize and amplify our position established in Revenue Ruling 54-161. C.B. 1954-1, 338 (Internal Revenue).

In general, 27 U.S.C. 205 (b) (3) states that it is unlawful for any producer, bottler, importer, or wholesaler of alcoholic beverages, directly or indirectly, or through an affiliate, to induce any retailer to purchase alcoholic beverages from him to the exclusion, in whole or in part, of any such products sold or offered for sale by other persons in interstate commerce by furnishing, giving, renting, lending, or selling to the retailer any fixtures, signs, supplies, money, services, or other things of value.

It was held in Revenue Ruling 54-161 that so-called free goods, discounts, rebates, refunds, and price reductions given to retailers pursuant to an agreement made at the time of sale are merely methods used to arrive at an agreed sales price and as such do not come within the purview of the Federal Alcohol Administration Act. However, if the free goods, discounts, rebates, etc., are such that the pricing aspect

is merely a subterfuge the transaction would constitute a "gift" within the meaning of 27 U.S.C. 205 (b) (3).

The Bureau has consistently recognized that discounts, rebates, refunds etc., may be granted to introduce new products, close out discontinued lines and pass on to retailers savings to the supplier as a result of volume purchases, etc., and, as such, are method used to arrive at an agreed sales price. However, if they are in reality a subterfuge for granting financial assistance to a retailer or for any other proscribed purpose, they would constitute a "gift" within the meaning of 27 U.S.C. 205 (b) (3).

Approximately one year ago the Bureau, at the request of industry, issued ATF Ruling 75 12. ATF C.B. 1975, 33, setting forth cost guidelines to assist industry in distinguishing between legitimate price reductions and proscribed inducements.

Investigations to date have disclosed that uniform application of the criteria by the Bureau has been impeded by:

(1) Differences in business or corporate structures.

(2) Differences in accounting systems

(3) Difficulty in determining whether a particular "operating" cost item should be included or excluded in "total operating" cost.

The disparity created by the above factors makes it impossible to administer the criteria in a fair and equitable manner.

In view of the above, the Bureau modifies its position regarding free goods, discounts, rebates, refunds, etc., to the extent that it will now consider questionable, and subject to investigation, the operations of any wholesaler or other supplier where it is found, or where there is reason to believe, the giving of a discount or price reduction results in a price to the retailer of less than the wholesaler's or supplier's "laid-in" cost. For the purposes of this ruling "laid-in" cost will be that cost incurred by a wholesaler or supplier to place the goods in inventory and would consist of such costs as manufacturer's invoice price, freight, and state and local taxes.

The above criteria will be applicable to all type discounts and price reductions (volume discounts, dollar volume purchases, combination "deals," etc.) and to all brand categories (combined brands, private label brands, etc.). Price determinations will be made primarily on an item by item basis for each item on an invoice.

The Bureau does not take the position that a sale below "laid-in" cost is automatically a violation of law, but merely that such a sale is questionable and may be investigated. If an investigation discloses that the discount, price reduction, etc., is in fact a subterfuge for granting financial assistance to a retailer the Bureau will consider the transaction a proscribed inducement: if the elements of exclusion and interstate or foreign commerce are also present, a violation of the Federal Alcohol Administration Act would be incurred.

It is not the intent of the Bureau to interfere with industry members' prerogative to use discounts, rebates, etc., as legitimate pricing arrangements. The Bureau's major objective in issuing this ruling is to furnish industry with the most effective yet practical criteria possible in distinguishing between legitimate price reductions and proscribed inducements. The criteria set forth above are intended solely to provide industry with a workable guideline with which to make this distinction.

Rev. Rul. 54-161. C.B. 1954-1, 338 (Internal Revenue), amplified by ATF Rul. 74-6, ATF C.B. 1974, 50, is hereby further amplified; ATF Rul. 75-12, ATF C.B. 1975, 33, is hereby superseded.

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Supreme Court of the United States

October Term, 1979

NO. 79-1156

G. WILLIAM MILLER, SECRETARY OF THE TREASURY, ET AL.,

Petitioners

v.

CASTLEWOOD INTERNATIONAL CORP., a Florida Corporation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, CASTLEWOOD INTERNATIONAL CORPORATION, a Florida corporation, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's Opinion in this case. That opinion is reported at 596 F.2d 638 (5th Cir. 1979).

REASONS FOR DENYING THE WRIT

The alcoholic beverage industry is highly regulated by both the State of Florida and the federal government. The industry has been organized into three distinct mandated tiers; (1) the manufacturer or distiller; (2) the wholesaler or distributor; and (3) the retailer. Both the United States and the State of Florida have enacted legislation that prohibits manufacturers and wholesalers from giving assistance to retailers by any gifts, or loans of money or property, or by the giving of any rebates of any kind whatsoever.[1] The legislative intent supporting both laws is identical, that is, the eradication of the pre-Prohibition practice known as the "Tied House Evil" whereby manufacturers and wholesalers controlled the small retail outlets by giving them financial assistance.

Both laws, however, permit wholesalers to give "discounts in the usual course of business" to retailers.[2] Discounts "in the usual course of business" are a natural by-product of larger volume sales, and are commonplace in all industries including the alcoholic beverage industry. Discounts to a retailer can however be easily disguised and converted into unlawful gifts or rebates. The problem besetting both Florida and Federal governments is to permit business-related discounts on sales, while at the same time, to impose regulations that

[1]§561.42(1) F.S.; 27 USC §205(b).

[2]§561.42(6) F.S. (1977); Rul. 161, 1954-1C.B. 338, amplified by ATF Rul.74-6, ATF C.B. 1974, 50, amplified by ATF Rul. 75-12, ATF C.B. 1975, 38 superseded by ATF Rul. 76-16, ATF C.B. 1976, 78.

will prevent erosion of the Tied House Evil prohibitions. Each government has enacted laws which have the common design of restricting the authorized discount from being abused. Each law, however, employs a different method to achieve the same results.

The approach of the Federal Regulation requires that discounts for volume purchases bear a reasonable relationship to the cost-savings which accrue to the wholesaler, and any transaction in which the discount would result in a sales price below the wholesaler's "laid-in cost" is prohibited.[3]

Since 1963,[4] Florida has chosen to prevent the abuse of discounts by a different method. Florida has chosen to structure its alcoholic beverage regulatory scheme on the basis of discounts established by competitive market forces subject to the requirement of making the price available to all purchasers, rather than

[3]See, Bureau of Alcoholic, Tobacco and Firearms Rulings 74-6 and 76-16. The effect of the setting of this "floor" is to inhibit natural competition thus forcing consumer prices to remain high.

[4]Prior to 1963 the director of the Florida Department of Alcoholic Beverages was authorized to place a "floor" under inter-tier discounts. A "discount in the usual course of business" was defined by §561.01(13) F.S. (1961), to mean:

> A cash discount given simultaneously at the time of sale, which shall not exceed the allowable discount fixed by the director [of the Florida Dept. of Alcoholic Beverages]

The authority of the director was repealed in favor of a statutory provision providing for unlimited discounts subject to equality among purchasers in Ch. 63-32, §1 Laws of Fla, 1963; §561.01(10) F.S. (1977).

placing a "floor" under inter-tier discounts or requiring a cost-savings relationship to exist in the discount. Section 561.01(10), Fla. Stat. (1979), defines a "discount in the usual course of business" to mean:

> A cash discount given simultaneously at the time of sale. The same discounts shall be offered to all vendors buying similar quantities.

In response to a certified question from the United States Court of Appeals for the Fifth Circuit, requesting an interpretation of that language,[5] the Florida Supreme Court held:

> A wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in costs or the savings attributable to quantity sales.[6]

[5]*Castlewood International Corp. v. Simon*, 564 F.2d 695, 698 (5th Cir. 1977). Since Florida's statute encourages the exercise of free market forces to provide price equality among all purchasers, the discount ultimately inures to the consumer. The method employed by Florida is therefore a better suited vehicle to effectuate the free market, antitrust policies of both Florida, §561.42 F.S., and the United States, 27 U.S.C. §205(b).

[6]*Castlewood International Corp. v. Simon*, 367 So.2d 613 (Fla. 1979). The Florida Supreme Court accepted the construction of the statute earlier stated by the Attorney General, 1973 Op. Att'y Gen. 073-196, Fla. Admin. Code R. 7A-4.461. The court noted that the contrary dictum in *Musleh v. Fulton Distributing Co.*, 254 So.2d 815, 818-19 (Fla. 1st DCA 1971), was not controlling.

Although both the state and federal laws are trying to achieve the same end, there is a clear conflict between the methodology employed by each. The court below correctly observed the existence of this conflict:

> . . . [I]t is apparent that the two regulatory schemes are in conflict as the federal policy creates a floor on wholesale prices below which prices, acceptable under the Florida scheme, may not go. We must therefore address the issue of which scheme Florida wholesalers must follow. *Castlewood International Corp. v. Simon*, 596 F.2d 638, 641 (5th Cir. 1979).

It is well established that if this conflict concerned any commodity other than alcoholic beverages, the federal regulation would clearly prevail by reason of the Supremacy Clause, U.S. Const. Art. VI, §2, and the Commerce Clause, U.S. Const. Art. I, §8, cl. 3. In regard to the regulation of the alcoholic beverage industry, however, section two of the Twenty-first Amendment grants some quantum of additional power to the states.[7] While the precise parameters of that additional power conferred upon the states have not been made clear by case law, nevertheless the Fifth Circuit correctly found that the facts of this case are centered well within such boundaries.

[7]The Twenty-first Amendment was ratified in 1933 and, in addition to repealing the Eighteenth Amendment, provided in Section 2 that:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

We do not claim that the Interstate Commerce Clause (U.S. Const. Art. I, §8, cl. 3) has been "stood on its head" by section two of the Twenty-first Amendment. The respondent acknowledges that the Twenty-first Amendment does not confer unlimited authority upon the states to regulate the liquor industry within its borders. The state's regulation even of its alcoholic beverage industry must yield where the state regulation is repugnant to overriding national concerns, to due process and equal protection, or where the state has sought to invade an area of exclusive federal interest, such as federally owned installations, regulation of commerce with foreign nations, or taxation of imports from foreign countries. *Castlewood International Corp. v. Simon,* 596 F.2d 638, 643 (5th Cir. 1979). None of those important federal interests exists here.

The Florida statute does not violate due process as in *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1970), or *Hornsby v. Allen,* 326 F.2d 605 (5th Cir. 1964). The Florida scheme of equality among purchasers certainly is the antithesis of any national concern for equal protection as in *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), or *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 178-179, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). The Florida statute does not purport to regulate in any area of exclusive federal concern as in *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938) (federally owned installations), *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 84 S. Ct. 1293, 12 L.Ed.2d (1964)(regulation of commerce with foreign nations), or *Department of Revenue v. James B. Beam Distilling Co.,* 377 U.S. 341, 84 S.Ct. 78,

11 L.Ed.2d 48 (1964) (taxation of imports from foreign countries in violation of the Export Import Clause). The Florida statute does not violate any federal laws, or offend strong national policy as in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 48 U.S.L.W. 4238 (No. 79-97), (Op. filed March 3, 1980), wherein this court held a California price maintenance law for alcoholic beverages to be in violation of the Sherman Act.[8] In that case, this court stated:

> . . . The Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although states retain substantial discretion *to establish other liquor regulations, those controls may be subject to the Federal Commerce power in appropriate situations.* The competing state and federal interest can be reconciled only after careful scrutiny of those concerns in a "concrete case". (cite omitted) (Emphasis added.)

Id. at 4241.

Absent a conflict with strong federal interests, the state's regulatory scheme must prevail since section two of the Twenty-first Amendment provides that the states are entitled to exercise substantial discretion to regulate the liquor industry within their own borders. *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 46 L.Ed.2d 336 (1966).

[8]The Florida law, rather, promotes the national interest in free competition by allowing market forces to determine the negotiated price which is then made available to all purchasers.

Therefore, the Florida statute, which represents only a minimal exercise of that power, appropriately comes within the ambit of the Twenty-first Amendment. The most logically sound interpretation of the Twenty-first Amendment at least permits the states to exercise that discretion in order to regulate entirely intra-state sales of alcoholic beverages, to prohibit price fixing and to encourage free competition. The Florida statute accomplishes those goals, while at the same time effectuating the commonly shared federal policy of eliminating the "Tied House Evil," although using a slightly different mechanism. The Fifth Circuit correctly held:

> Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.
>
> . . .
>
> In the instant case, the Florida Statute concerns only liquor sold to Florida retailers. Florida retailers may not purchase directly from the manufacturer but rather, must purchase from a wholesaler located within the state. Fla. Stat. §561.14(3). In other words, the Florida provision touches and concerns only

> wholesalers and retailers within the state of Florida. There can be no doubt that this is a valid exercise of Florida's police power, as recognized by the Twenty-first Amendment. (cite omitted)
>
> . . .
>
> Thus absent a strong federal interest the state scheme must prevail. No interest of sufficient magnitude is advanced in support of ATF Ruling 74-6. Accordingly, we hold that insofar as ATF Ruling 74-6 and Florida Statute §561.42(6) conflict, the Florida Statute must prevail. Accordingly, we reverse the holding of the district court and remand this action so that the district court may enter its order in accordance with this opinion.

The court below correctly held that although the Twenty-first Amendment does not grant plenary power to the states, the Florida statute is well within the innermost dimensions of the grant of authority, thus presenting no challenge to the perimeters of the discretion conferred by the Amendment. The amount of power granted to the states by the Twenty-first Amendment has until now been defined in the negative by case law which has only determined when the power has been exceeded. The court below correctly found that the Florida statute which exercises only the minimal amount of that power which is necessary to accomplish legitimate state interests, without offending national concerns, "is a valid exercise of Florida's police power, as recognized by the Twenty-first Amendment."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 79-1156

In the Supreme Court of the United States

OCTOBER TERM, 1979

G. WILLIAM MILLER, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

CASTLEWOOD INTERNATIONAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
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1. Respondent concedes (Br. in Opp. 2) that sales discounts to retailers can "easily be disguised and converted into unlawful gifts or rebates." Respondent also concedes (*id.* at 3) that ATF Ruling 76-16 and the Florida statute have "the common design of restricting the authorized discount from being abused." Respondent nevertheless finds a conflict between the statutory schemes. We do not.

a. Both the court of appeals and respondent err in characterizing ATF Ruling 76-16 as establishing a "floor" below which wholesales prices may not go (Pet. App. 5a; Br. in Opp. 3 & n.3). ATF Ruling 76-16 expressly states that the Bureau "does not take the position that a sale below 'laid-in' cost is automatically a violation of law, but

merely that such a sale is questionable and may be investigated" (Pet. App. 36a). If the investigation discloses that the discount is a subterfuge for granting financial assistance to a retailer, ATF will consider the transaction a proscribed inducement. Even then, violation of 27 U.S.C. 205(b)(3) does not occur unless the statutory elements of exclusion of other suppliers and interstate or foreign commerce are also shown (Pet. App. 36a).[1] See 27 U.S.C. 205(b); Proposed 27 C.F.R. 6.4(a) and 6.21, 44 Fed. Reg. 45305-45306 (1979).

b. This is simply not a situation, as respondent would have it (Br. in Opp. 5, 7), in which one of the statutory schemes must prevail and the other must fall. A wholesaler in Florida may comply fully with both laws by offering discounts on the same terms to all retailers (as required by Florida law), but at the same time ensuring that its prices do not fall below laid-in cost without a business justification (which will ensure compliance with 27 U.S.C. 205(b)(3), as interpreted by ATF Ruling 76-16). Nor would a wholesaler's compliance with 27 U.S.C. 205(b)(3) in this regard frustrate the purposes underlying Florida law. For while Florida law permits prices below wholesale cost without limitation, there is no indication of an affirmative state policy to encourage sales below cost that have no business justification—a situation that may involve predatory pricing.

---

[1]Contrary to respondent's apparent misapprehension (Br. in Opp. 8-9), this case does not involve any challenge to Florida's authority under its police power or the Twenty-First Amendment to enact Fla. Stat. Ann. § 561.42 (West Supp. 1979). This case involves only the relationship between that conceded authority and Congress' exercise of its Commerce Clause power over interstate commerce in alcoholic beverages.

2.a. Even if there were thought to be some conflict between the policies underlying the federal and state statutory schemes, this Court's recent decision in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, No. 79-97 (Mar. 3, 1980), makes clear that the Twenty-First Amendment does not excuse wholesalers in Florida from complying with 27 U.S.C. 205(b)(3). The language of Section 2 of the Amendment, which is the primary guide in analyzing the Section's scope (*Midcal*, *supra*, slip op. 9), by its terms prohibits the transportation or importation of intoxicating liquors into a state only for delivery or use "in violation of the laws" of the state. Wholesalers in Florida who comply with federal law by offering price discounts below laid-in cost only for legitimate business reasons will not be "in violation of" Florida law as long as they offer the same terms to all retailers. Surely, then, the federal interest here stands on even firmer footing than that in *Midcal*, where compliance with the Sherman Act did require a violation of state law (which was to that extent superseded).

b. The Court stressed in *Midcal* that the Twenty-First Amendment by its terms gives states control over the "transportation or importation" of alcoholic beverages within their borders, and that this grants the states broad latitude in determining whether to permit importation or sale of liquor and how to structure the liquor distribution system (slip op. 10, 12). The present case involves neither of these core interests protected by the Twenty-First Amendment.[2] The Court made clear that in other areas,

---

[2]Nor can there be any serious contention that Florida's policy of encouraging lower prices (Pet. App. 17a) serves a state interest in temperance. Compare *Midcal*, *supra*, slip op. 14.

state regulation may properly be limited by federal legislation enacted under the Commerce Clause (slip op. 12). Here, 27 U.S.C. 205(b)(3), as interpreted by ATF Ruling 76-16, furthers the important federal interest in stopping the Tied House Evil in its incipiency by barring discounts that are a subterfuge for prohibited financial assistance to a retailer or may have the effect of driving competing wholesalers out of the market. Respondent does not advance any countervailing state interest in support of below-cost sales under these circumstances.

3.a. For the reasons given, we believe the court of appeals' decision is inconsistent with this Court's subsequent decision in *Midcal*. At the very least, *Midcal* sheds significant new light on the proper accommodation of state and federal regulation in this area. We therefore suggest that the Court grant the petition for a writ of certiorari and remand the case to the court of appeals for reconsideration in light of this Court's decision in *Midcal*.

b. An additional factor weighs in favor of remand here. On April 22, 1980, the United States Court of Appeals for the District of Columbia Circuit rendered a decision holding that there is no *statutory* authority for ATF Ruling 76-16 if applied to all below-cost sales for which the wholesaler does not advance an affirmative business justification. *National Distributing Co.* v. *United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms*, No. 78-2303 (D.C. Cir. Apr. 22, 1980).[3] The court held that 27 U.S.C. 205(b)(3) can be interpreted to bar sales below cost that are offered on similar terms to all retailers only if the retailer, as part of the transaction, makes an agreement about future sales or other matters

[3]We have lodged ten copies of the court's opinion in *National Distributing Co.* with the Clerk of this Court.

that might tie the retailer to the supplier or if the transaction is intended to give the wholesaler control over retailers or drive a competing wholesaler out of business (slip op. 2, 12 & n.27, 47-48). ATF, in consultation with this Department, is now assessing that decision.

The Fifth Circuit in the present case did not address the statutory issue decided by the District of Columbia Circuit in *National Distributing Co.*, no doubt because respondent did not seriously challenge the statutory basis or apparent scope of ATF Ruling 76-16.[4] If ATF should refine ATF Ruling 76-16 as a result of recent developments, it would be appropriate to present this new information to the court of appeals in the first instance.[5]

[4]Respondent only suggested in passing (Appellant's Br. at 22-23) that ATF Ruling 76-16 was somehow anticompetitive and was therefore "ultra vires" under 27 U.S.C. 205(b)(3).

[5]As we pointed out in our petition for a writ of certiorari (Pet. 28-29), the Fifth Circuit's decision in this case has been invoked by the industry in a number of challenges to proposed ATF regulatory measures where there is a state law addressing the same subject. In *Wine Industry of Florida* v. *Miller*, 609 F. 2d 1167 (5th Cir. 1980), the Fifth Circuit relied on the decision below in holding that ATF Ruling 77-4, which prohibits wholesalers from stocking retailers' shelves and marking retail prices, is invalid under the Twenty-First Amendment as applied in Florida because it conflicts with a Florida statute authorizing such services. We believe that the Fifth Circuit's decision in *Wine Industry*, as in the present case, was incorrect.

We have decided not to petition for certiorari in the *Wine Industry* case, however. ATF proposed regulations last August that would supersede ATF Ruling 77-4 and allow servicing of retail establishments by wholesalers. Proposed 27 C.F.R. 6.98, 44 Fed. Reg. 45309 (1979). ATF informs us that the comprehensive regulations of which the cited provision is a part will be promulgated in final form sometime within the next several months and that it appears likely that the proposed 27 C.F.R. 6.98 will be promulgated in essentially the same form as initially proposed. It thus appears that there will no longer be a live controversy with respect to ATF Ruling 77-4.

For the reasons given, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of this Court's decision in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*

Respectfully submitted.

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Solicitor General

MAY 1980